

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

MARK REED MILLER,

Appellant.

No. 33480-1-II

UNPUBLISHED OPINION

Hunt, J. — Mark R. Miller appeals his second degree incest conviction. He argues that (1) the trial court abused its discretion in admitting evidence, (2) the State engaged in prosecutorial misconduct, (3) his trial counsel rendered ineffective assistance, (4) the trial court erred in sentencing him beyond the statutory maximum, and (5) the trial court erroneously included in his offender score a prior offense for which he had been not convicted. In his Statement of Additional Grounds<sup>1</sup> (SAG), Miller argues in addition that the prosecutor committee misconduct in calling the victim’s sister “crazy” during sentencing. The State concedes error in sentencing and agrees that the trial court should amend its sentencing order.

We affirm in part, vacate Miller’s sentence, and remand for resentencing.

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<sup>1</sup> RAP 10.10.

## FACTS

### I. Sexual Contact With Sister

Mark R. Miller and M.M. are adult brother and sister, respectively; they grew up in Oregon. When Miller was about 18 years old<sup>2</sup> and M.M. was a year or two younger, Miller fondled M.M. Miller was charged with incest, pleaded guilty to a reduced charge of sexual misconduct, and was sentenced in 1989 in Oregon.

In late October 2004, Miller was living in Washington with his brother, Mike Miller (Mike).<sup>3</sup> When M.M. visited Mike's home and learned that Miller had to move, she offered him temporary lodging at her home. Miller then moved in with M.M.

On January 22, 2005, Miller was lying on M.M.'s bed talking with her about family issues throughout the evening until early the following morning. M.M. sat next to Miller most of the evening and eventually laid down next to him when she got tired. When Miller curled up next to M.M., placing his head on her shoulder, she told him, "get off me[;] I'm not your pillow." Report of Proceedings (RP) Vol. 5 at 55.

Instead of moving away, Miller placed his leg over M.M.'s. M.M. again told him to "get off." Over M.M.'s objection, Miller grabbed her breasts and her "private part" between her legs. M.M. felt "scared to death" but she did not leave the room. She fell asleep for the next few hours.

The next day, she told Mike about the incident with Miller, prompting Mike to contact the

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<sup>2</sup> Miller was around 18 years old at the time of the incident. He was 19 when convicted in 1989.

<sup>3</sup> We use Mike's first name for clarity. We intend no disrespect.

police.

## II. Procedure

The State charged Miller with second degree incest for engaging in sexual contact with a person he knew to be his sister.

### A. Pretrial

The State moved in limine to introduce evidence of Miller's December 5, 1989 Oregon conviction for sexual misconduct against M.M. Miller objected that this prior conviction was inadmissible under ER 404(b).

The trial court granted the State's motion and allowed the State to introduce Miller's 1989 Oregon judgment and sentence. But the trial court did not allow the State to call M.M. to testify about the events leading to this conviction.

### B. Testimony and Exhibits

At trial, the State asked M.M. whether she had found any of her personal items out of place when she awoke after the incident with Miller. The following dialogue ensued:

[Miller]: Objection, Your Honor, as to relevance.

[Court]: Counsel.

*(Bench conference; not recorded.)*

[State]: I'll just rephrase the question. . . . Discussing strictly your property, did you find any of your personal property out of place?

[Melissa]: Yes.

RP Vol. 5 at 63-64. Miller did not further object. M.M. then testified that she was missing nylons, underwear, a body suit, an exercise body suit, and a blue top, all of which she later found in Miller's bag in his bedroom.

The State also asked M.M. about Miller's 1989 Oregon conviction and moved to admit

the 1989 judgment and sentence as an exhibit, producing a certified record of the conviction. Miller responded, “Yes, Your Honor, pursuant to earlier discussions we’ve had.” RP Vol. 5 at 48. The trial court received the certified record of the Oregon conviction as an exhibit.

### C. Jury Instructions

The trial court provided the jury with the following pertinent instructions:

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

Clerk’s Paper (CP) at 59 (Jury Instruction No. 5).

The defendant is not on trial for any act or conduct not alleged in the information.

CP at 61 (Jury Instruction No. 7).

Evidence has been introduced in this case on the subject of prior sexual contact with the alleged victim for the limited purpose of showing prior sexual behavior toward the other[.] You must not consider this evidence for any other purpose.

CP at 62 (Jury Instruction No. 8).

### D. Closing Argument

In closing, Miller argued:

So in just trying to look at, you know, both sides here and see what we have, I told you earlier, and I still think it’s pretty much true, it’s kind of a him versus her. You’ve heard a couple of other little things, depending on how you look at it.

But as far as the other witnesses go, as far as the people that talk about what happened on Sunday, the brother and the sister, the ex-husband, that has to do with, you know, how -- how the case came to the -- to the police. Pretty much window dressing. I believe that doesn’t directly talk to what happened the day before.

That is still pretty much between [M.M.] and Mark. . . . Circumstantial evidence can prove things. But here we just have very little evidence at all. And it’s not a substitute for no evidence, and that’s, unfortunately, the State’s problem here, is that they don’t have much to go on.

RP Vol. 5 at 122-23.

In rebuttal, the State argued:

The second point the State wants to address is the other witnesses that -- that the State produced, the circumstantial evidence. Well, that is important in the sense that you have the direct testimony of one of the two people who was in the room and who tells you -- who told you under oath what happened, that she was touched inappropriately.

. . . .

The fourth point of the seven. Defense counsel says the State wants you to believe -- believe if it happened before, it could happen again. And that's absolutely not what the State wants you to believe, because that's not what the law allows you to do. The law does not allow you to say he did it before so he'll do it again.

What the State wants you to do is read the law and follow the law, and you can use that information, the fact of his prior conviction, to show that he has this sexual attraction for his sister. And that's all you can use it for.

RP Vol. 5 at 134, 136-37.

#### E. Verdict and Sentencing

The jury found Miller guilty of second degree incest. Before sentencing, the trial court addressed Miller's criminal history. The State produced a certified copy of Miller's criminal history, about which the parties raised issues. The trial court then ordered a presentence report.

The presentence report contained background information on Miller, including the victim's concern, a statement by Miller, and Miller's criminal history, including seven prior Oregon convictions. The report recommended the high end of the maximum standard-range sentence, 60 months of confinement.

At sentencing, the State indicated agreement with the report and recommended a maximum sentence of 60 months confinement. Miller's counsel requested a low-end standard-range sentence. He did not ask the trial court to determine to what Washington crimes, if any, his

prior Oregon convictions were comparable. The trial court stated:

[W]e have six felonies that is without dispute, as I understand, and the issue -- and [Miller is] raising an issue as to the misdemeanor scoring the additional 3?

RP Vol. 7 at 162. Miller's counsel replied, "Yes, Your Honor." RP Vol. 7 at 162. Miller then made a personal statement to the court.

The trial court calculated Miller's offender score at six, determined that the standard sentence range sentence was 41 to 54 months, and sentenced Miller to 54 months confinement with "[c]ommunity custody for a range of 36 to 48 months or earned early release, whichever may be greater." RP Vol. 7 at 170.

Miller appeals.

## ANALYSIS

### I. Evidentiary Rulings

#### A. Standard of Review

All relevant evidence is generally admissible. Nonetheless, relevant evidence may not be admissible if its prejudicial effect substantially outweighs its probative value. ER 401, 403. In addition, if the State submits evidence that the defendant has committed crimes other than the acts charged, before admitting the evidence, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred, (2) identify the purpose for which the evidence will be admitted, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect that the evidence may have upon the fact-finder. ER 404(b); *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

We review a trial court's admission of evidence for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (quoting *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)), *review denied*, 133 Wn.2d 1019 (1997). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538 (1983). We find no abuse of discretion here.

#### B. Victim's Missing Personal Items

Citing ER 404(b), Miller argues that the trial court erred in allowing M.M.'s prejudicial testimony about her missing personal property, asserting that her testimony was equivalent to accusing Miller of stealing her clothes.<sup>4</sup> This argument fails.

The State asked M.M. whether she had found any of her personal items to have been out of place. Miller objected that this information was irrelevant. Miller never objected that the question would elicit unduly prejudicial testimony. Defendants cannot object on one ground at trial and raise a different ground on appeal.<sup>5</sup> RAP 2.5; *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993); *State v. Mak*, 105 Wn.2d 692, 719, 718 P.2d 407, *cert. denied*, 479 U.S. 955 (1986). Therefore, on appeal Miller cannot challenge the State's question, and its elicited

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<sup>4</sup> Miller mischaracterizes M.M.'s testimony as describing an "alleged theft" and "stolen items." But M.M. did not testify that her personal items were stolen or that Miller was a thief. Rather, she testified only that her clothing items were missing and that she found them in Miller's room.

<sup>5</sup> A defendant must state the specific ground for an objection when the trial court admits or denies evidence. ER 103(a)(1).

response, as prejudicial.

After the trial court conferred with the parties off the record, the State rephrased the question. M.M. then testified that she found a number of missing clothes in Miller's room inside his bag. Miller did not further object on the record to the State's rephrased question or to M.M.'s testimony in response. Therefore, he cannot now raise this non-constitutional issue for the first time on appeal. RAP 2.5; *Walker*, 121 Wn.2d at 218; *Mak*, 105 Wn.2d at 719.

We hold that the trial court did not abuse its discretion in admitting M.M.'s testimony about her missing personal items.

### C. Miller's Prior Sexual Misconduct Against M.M.

#### 1. 1989 Oregon Judgment and Sentence

Miller next argues that the trial court abused its discretion in admitting a copy of his 1989 Oregon judgment and sentence for sexual misconduct against M.M. 15 years earlier. He contends that (1) the jury did not need to know that Oregon originally charged him with incest or that his guilty plea to sexual misconduct resulted in this conviction, and (2) the State should have introduced this evidence through testimony or through a redacted version of the judgment and sentence. Again, this argument fails.

Miller renewed his objection when the State sought to introduce his 1989 Oregon judgment and sentence at trial. He objected generally that the entire judgment and sentence was prejudicial because the conviction had occurred 15 years earlier. He did not, however, (1) object to any *particular* information in the judgment and sentence as prejudicial (such as the original incest charge, reduced to a lesser charge), as he does now on appeal; (2) ask the trial court to

redact any particular information in the judgment and sentence; or (3) ask the trial court to limit the State to presenting only witness testimony about the conviction, in lieu of the judgment and sentence document, either of which he now claims, for the first time on appeal, would have been less prejudicial.

Nonetheless, in response to Miller's general objection, the trial court limited M.M.'s testimony to the fact of the conviction; the trial court did not allow her to testify about the underlying facts of the incident that resulted in the Oregon conviction. Miller having failed to articulate at trial more specific grounds for objecting to his judgment and sentence, he cannot argue for the first time on appeal that the trial court should have further restricted the evidence.<sup>6</sup> RAP 2.5; ER 103(a)(1).

Moreover, Washington courts have consistently held that evidence of collateral sexual misconduct is admissible under ER 404(b) if it shows, as does Miller's 1989 conviction, the defendant's previous sexual desire for that particular victim. *State v. Ray*, 116 Wn.2d 531, 547,

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<sup>6</sup> Even if Miller had articulated a more specific objection below, his argument would still fail. Miller cites *State v. Bouchard*, 31 Wn. App. 381, 384, 639 P.2d 761, *review denied*, 97 Wn.2d 1021 (1982), but *Bouchard* involve a child's testimony about prior, uncharged sexual abuse. Such is not the case here, where the trial court specifically limited M.M.'s testimony to the fact of the prior conviction, without allowing her to go into the underlying facts.

Rather, the trial court specifically limited admissible evidence to the information pertaining to the conviction. It did not permit M.M. or any other witness to discuss the circumstance surrounding the misconduct or the underlying facts leading to the conviction. Moreover, this court cannot say that it was necessarily prejudicial for the trial court to allow information regarding (a) the original charge of incest, as opposed to sexual misconduct against his own sister; (b) Miller pleading guilty to a lesser charge, as opposed to telling the jury that an Oregon court convicted him; or (c) the fact the court convicted, as opposed to simply stating that he committed sexual misconduct. Accordingly, even had this issue been properly before this court, we would see no abuse of discretion.

806 P.2d 1220 (1991); *State v. Guzman*, 119 Wn. App. 176, 182, 79 P.3d 990 (2003), *review denied*, 151 Wn.2d 1036 (2004). Such evidence is deemed probative of the crime charged, not unduly prejudicial error warranting reversal. The trial court's ruling here was consistent with this line of Washington cases.

We hold, therefore, that the trial court did not abuse its discretion in admitting Miller's 1989 Oregon judgment and sentence for sexual misconduct against M.M.

## 2. Length of Time Since Previous Conviction

Miller further argues that the trial erred in admitting evidence of his 1989 Oregon conviction because it had occurred 15 years earlier, such that its prejudicial effect outweighed its probative value. Again, we disagree.

In *Ray*, the State charged the defendant with first degree incest based on his having sexual intercourse with his daughter. *Ray*, 116 Wn.2d at 532-33. The trial court admitted testimony that Ray had initiated sexual contact with his daughter on three occasions ten years earlier. *Id.* at 547-48. Our Supreme Court held:

The evidence of prior sexual contact here is directly connected to "the offended person", [the daughter], and reveals Ray's lustful inclination toward [the daughter]. While the incidents alleged occurred approximately 10 years before the crime charged here, the Court of Appeals correctly noted that [the daughter] was in foster care during that time, and Ray, thus, could not approach her. In these circumstances, the trial court did not abuse its discretion when it found that the alleged conduct was not too remote in time to the incest alleged in 1987 to have probative value and it correctly admitted [the daughter's] testimony about the prior incidents of sexual contact with Ray.

*Id.*

In *Guzman*, Division III of our court considered whether the defendant's previous sexual

contact with the victim six years earlier was admissible under *Ray*, where Guzman had maintained regular contact with the victim during the intervening period. *Guzman*, 119 Wn. App. at 183.

The *Guzman* court held:

While the record indicates that [Defendant] Mr. Guzman and [Victim] M.J. had some social contact in the intervening years, the testimony does not indicate that this contact was extensive. After the 1995 incident, [M.J.'s sister] moved back with her parents for four months, but then got back together with Mr. Guzman; the couple married in 1998. The Guzmans visited the home of [M.J.'s parents] . . . about once a month. M.J. also sometimes visited the Guzmans in their home. Based on the record here, the trial court did not abuse its discretion by admitting evidence of sexual contact occurring six years earlier.

*Id.*

*Ray* and *Guzman* illustrate the following rules for previous sexual incidents. First, in deciding whether to allow evidence of a defendant's prior sexual misconduct, the trial court has discretion over the interplay between the length of time since the previous incidents and the range of allowable evidence. *Ray*, 116 Wn.2d at 547; *Guzman*, 119 Wn. App. at 183. Second, evidence of the defendant's prior sexual misconduct against the same victim is relevant to show his lustful disposition toward that particular victim. *Ray*, 116 Wn.2d at 547; *Guzman*, 119 Wn. App. at 182. Third, the appellate court looks at the overall circumstances to determine whether the trial court abused its discretion in allowing such previous sexual incidents into evidence; there is neither a rigid guideline nor any one particular factor that controls.<sup>7</sup> See *Ray*, 116 Wn.2d at

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<sup>7</sup> Miller cites *Bouchard*, in which we stated, "The fact that the acts with the son were 3 years removed from the charged act does affect relevance." 31 Wn. App. at 386. Miller argues that the length of time is similarly relevant here. But we also stated in *Bouchard* that the effect of the elapsed time goes more to the evidence's weight than to its admissibility. *Id.*

Critical to the inadmissibility of Bouchard's previous sexual misconduct was that the victim was not the same victim as in the charged offense -- an important distinction between *Bouchard* and the case before us here. Thus, contrary to Miller's argument, *Bouchard* does not

547-48; *Guzman*, 119 Wn. App. at 183.

Here, M.M. testified that she had not maintained regular contact with Miller since his 1989 conviction. She did not see Miller for four to six years after the 1989 incident, and she had seen him only a few times in the ten years preceding the charged incident. In late October, 2004, she discovered that Miller had been staying with their brother Mike but could no longer stay there. Miller then moved into M.M.'s house temporarily. Less than three months later, Miller again committed incest against M.M.

Moreover, any prejudicial effect of the admitted evidence was limited. The trial court gave the jury limiting instructions specifically admonishing them not to consider Miller's prior sexual history as evidence other than to show his sexual disposition toward his sister. The court also instructed the jury that Miller was not on trial for any other act or conduct not contained in the information. In addition, the State reiterated during closing argument that the law allows Miller's previous conviction only to show Miller's sexual attraction toward M.M. and that the law did not allow the jury to convict Miller for incest simply because he did it before.

Based on these facts, we hold that the trial court did not abuse its discretion in admitting evidence of Miller's previous sexual act against M.M.<sup>8</sup>

## II. No Prosecutorial Misconduct

Miller argues that the State violated his right against self-incrimination under the United States Constitution when, in its rebuttal argument, it referred to his failure to testify.<sup>9</sup> *See State*

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render inadmissible Miller's previous misconduct against the *same* victim, M.M.

<sup>8</sup> Furthermore, error, if any, was harmless.

<sup>9</sup> Miller also argues that the State mentioned during sentencing that one of its witnesses was

*v. Carneh*, 153 Wn.2d 274, 282, 103 P.3d 743 (2004). We disagree.

#### A. Standard of Review

To prevail on a claim of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect. *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). Prejudice exists only if there is substantial likelihood that the misconduct affected the jury's verdict. *Id.* Failure to object constitutes a waiver of error unless the improper remark was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a jury admonition. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Miller fails to meet this burden here.

#### B. State's Closing Argument

Miller never objected to the State's allegedly improper comment. Thus, he waived his right to raise the issue for the first time on appeal. RAP 2.5.

Even assuming that Miller is not precluded from raising this constitutional issue for the first time on appeal, the record does not support his contention that the State's closing argument violated his right against self-incrimination. In his closing, Miller argued that the jury should see both sides, that this situation involved "him versus her," that there was very little evidence showing that he had committed the charged crime, and that this situation was a personal matter between him and M.M. RP Vol. 5 at 122-23.

The State's rebuttal argument was a legitimate response to Miller's closing argument

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"crazy" after the witness submitted a letter to the court about M.M.'s having lied to that witness. Despite having an opportunity to raise this issue during sentencing, Miller failed to do so. RAP 2.5 (issues raise for first time on appeal). Moreover, Miller fails to show how this comment was prosecutorial misconduct. Thus, we do not further address this point.

about the paucity of evidence showing that he had committed the charged crime. Agreeing with Miller that there were two parties—M.M. and Miller—the State then reminded the jury that M.M.’s testimony was direct evidence that Miller had committed the crime.<sup>10</sup> The State did not, however, directly or indirectly comment on Miller’s constitutional rights to remain silent and not to testify.

We hold that the State did not engage in prosecutorial misconduct.

### III. Sentence

Miller next argues that the trial court erred in sentencing him when it ordered 54 months of incarceration and 36 to 48 months of community custody,<sup>11</sup> because the total exceeds the statutory maximum sentence.<sup>12</sup> The State concedes this error and agrees that the trial court should amend its sentencing order. *See* RCW 9.94A.505(5).

Accepting the State’s concession, we hold that because Miller’s total confinement and community custody sentence cannot exceed the statutory maximum, the trial court’s sentencing order is in error and must be corrected. *See State v. Sloan*, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004).

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<sup>10</sup> Moreover, even if the State’s closing argument could be characterized as a comment on Miller’s right to remain silent, Miller “opened the door” for the State to rebut similar statements Miller made in his closing argument. *See State v. Jones*, 111 Wn.2d 239, 249, 759 P.2d 1183 (1988).

<sup>11</sup> In this SAG (Statement of Additional Grounds), RAP 10.10, Miller also asserts that Oregon did not convict him of carrying a concealed weapon in 1996. But he fails to point to any evidence controverting his 1996 Oregon conviction. Moreover, at sentencing, his counsel affirmatively agreed to the existence of the 1996 Oregon conviction, and Miller himself did not object, despite having made a statement to the court.

<sup>12</sup> RCW 9.94A.510 and .525.

#### IV. Effective Assistance of Counsel

Miller argues that he received ineffective assistance of counsel because his trial counsel (1) failed to call witnesses to show that M.M. had falsely accused another man of rape<sup>13</sup> and (2) either failed to challenge or appeared to agree that his Oregon convictions were comparable to Washington crimes for offender score calculation purposes.

##### A. Standard of Review

To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). There is great judicial deference to counsel's performance, and the analysis begins with a strong presumption that counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

##### B. Failure to Call Witnesses

Miller does not show how trial counsel's failure to call witnesses was ineffective assistance of counsel. Miller contends that evidence of M.M.'s previous false rape accusations would have shown that she was making false statements about him. But the record does not show who these

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<sup>13</sup> See Miller's SAG.

witnesses might have been, whether Miller could have obtained their testimony, or whether, in fact, such testimony would have actually cast doubt on M.M.'s credibility. In his SAG, Miller merely speculates about what such a witness might have said. *See McFarland*, 127 Wn.2d at 333 (“asserted error must be ‘manifest.’ . . . If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.”) We hold, therefore, that Miller failed to meet his burden of showing ineffective assistance of counsel for failure to call witnesses.

### C. Comparability Analysis

Miller argues that either his counsel did not agree, but failed to object, to inclusion of his Oregon convictions in his offender score or that counsel did agree but rendered ineffective assistance of counsel in so doing. The record is unclear about whether counsel agreed that Miller's Oregon convictions were comparable to Washington crimes. If counsel did not agree, we would remand for comparability analysis.<sup>14</sup>

But having already decided to vacate the erroneous sentence and remand for resentencing on other grounds, we do not further address the ineffective assistance of counsel argument based on failure to pursue a comparability analysis. Instead, we direct the sentencing court on remand to address the comparability issue.

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<sup>14</sup> *See State v. Beals*, 100 Wn. App. 189, 196-97, 997 P.2d 941, *review denied*, 141 Wn.2d 1006 (2000). Unlike in *State v. Jackson*, we would need to remand this case rather than decide the issue here, as we do not have sufficient information for proper comparability analysis. 129 Wn. App. 95, 106, 117 P.3d 1182 (2005), *review denied*, 156 Wn.2d 1029 (2006).

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Accordingly, we affirm Miller's conviction, vacate his sentence, and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Hunt, J.

We concur:

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Houghton, P.J.

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Bridgewater, J.